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MERCHANT SHIPPING.

NATURALIZATION.

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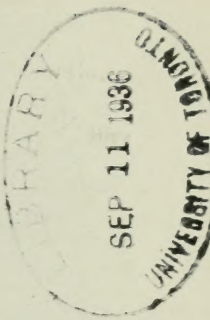

(In order to draw attention to the purpose for which quotations are employed, italics not appearing in the original, are sometimes made use of).

IN a previous Paper, I gave, as a reason for the absence of explanation of Canada's constitutional position with reference to merchant-shipping and naturalization, that discussion of such subjects would necessarily be of too technical a character, and, acting upon that idea, I commenced publication of my views in the Canadian Law Times (*a*). I have been led to believe that very many of the laity would like to have an opportunity of endeavoring to understand our relations to the United Kingdom with respect to such very important subjects, and I now beg to submit the following for their consideration.

MERCHANT SHIPPING.

If the British Empire was not originated for commercial reasons, its development, at all events, was due almost exclusively to the wealth produced by the trade which it supplied, and to the employment which it gave to British shipping. Development in colonial status (from colonies to Kingdoms) necessarily gave rise to the many constitutional questions involved in a divided form of government, and their adjustment is now of great historical and constitutional interest. But underneath all such questions was that which originated them, namely, the necessity for the perpetuation of commercial advantages; and, in this view, the insistence upon Downing Street control must be regarded as not in itself of metropolitan importance, but as the means or method, merely, by which the trade-monopoly of England was preserved.

(*a*) Nov., 1911.

The American revolution, for example, was resisted not for sentimental reasons, but because British merchants did not wish foreigners to participate in colonial trade; and a humiliating settlement of the quarrel was finally agreed to by Great Britain principally with a view to placating the colonials, and thus, it was hoped, forfending the exclusion of British merchants, by American statutes, from those trade-benefits which British statutes had previously given them in monopoly.

The Canadian provinces succeeded to the American situation (1763). Downing Street kept us well secluded from the world, commercially. We were a British "possession"—a British preserve; and British merchants were protected from foreign interference until the eighteen-forties, when the United Kingdom, having adopted free-trade principles, the bars were thrown down; our value as a possession was reduced to zero; and we were pleasantly described as a mill-stone round the British neck.

From that time development of our constitutional freedom became, in certain respects, a simple, if a somewhat tedious and occasionally annoying process. No longer could any sufficient reason be suggested for interference with our purely local affairs; no longer had the governors any motive for acting as leaders of one of the colonial political parties; no longer had they any object in defying the legislative assemblies. But in certain other respects—in those, namely, in which sections of the British people still continued to consider themselves entitled to privileges in the colonies—there was the same old difficulty; the same old objection to colonial interference with those privileges; the same old pressure and interference from Dowing Street.

For example, British authors and publishers have always imagined that the colonies ought to do as they were told in the matter of buying books. The story is too long to be told here (*a*), and my present purpose is to cite it merely as an example of the cases to which I have referred—as a case in which, notwithstanding our alleged position as a self-governing colony, we were not permitted to regulate the sale of books in our own territory(*b*).

Then there was the treaty-making power. British merchants, notwithstanding the advent of responsible government in the colonies, still continued to be interested in our commercial relations with other countries, and only after a protracted struggle (*c*) have we quite lately succeeded in securing an acknowledgement of our right to do as we like.

(*a*) A short statement of it may be seen in my book "The Kingdom of Canada, pp. 17–19.
(*b*) The inhibition is only at this late date in process of removal.
(*c*) Ante, pp. 107-8.

One last subject remains, namely, merchant shipping. It promises to be somewhat difficult of arrangement. Indeed, there is strong probability that the only method of settling it is by a declaration of the independence of those colonies which desire constitutional freedom to deal with this most important subject of national life.

"Why so? Have not all other difficulties yielded to less drastic remedies?" They have. As soon as the British government, from time to time, announced its willingness to acknowledge our authority, former questions have automatically disappeared. But the peculiarity of the merchant-shipping question is that—

(1) The British government believes that the concession of colonial authority, followed by proposed colonial legislation, would affect British shipping not merely in the colonies, but all over the world—that foreign countries would pass retaliating laws; and

(2) Even if the British government were willing to acknowledge colonial authority, the colonies would still be unable to legislate as freely as they might wish—they would still be bound by treaties with foreign powers which Great Britain does not wish to denounce.

Independence would remove both difficulties, for—

(1) The retaliatory laws which the United Kingdom fears, would not affect her. They would be directed against the offending state only; and

(2) Each state could for itself withdraw from the treaties.

I want to try and explain our position with reference to this important subject. It is rather complicated, but, as I think, very interesting. We must commence by understanding that a British ship is a ship registered in accordance with the British statute. It may be registered in one of the colonies, but it will be still legally speaking, a British ship. In the present paper the phrase *British ships* will be used in this inclusive sense, while distinction among them will be indicated by the phrases *United Kingdom ships, Colonial ships, Canadian ships,* and so on.

What Australia and New Zealand Want: Australia and New Zealand (*a*):—

1. Propose that all ships, British and foreign, engaging in their trade shall be subject to their legislation.

2. The practical purposes which they have in view are:

(*a*) The exclusion of ships which pay rates of wages lower than the local standard.

(*a*) Canada and South Africa have not the same problems as their sister colonies, and have not, as yet, felt the pinch of Downing Street interference.

(*b*) The exclusion of ships which refuse to comply with the local laws with reference to equipment, *e.g.*, number of crew, accommodation, and sanitary arrangements.

These colonies appear to be determined to insist upon freedom to legislate upon such points, and no one who has read the proceedings of the Colonial Merchant Shipping Conference of 1907 and of the Imperial Conference of 1911, can fail to be impressed with the earnestness of their conviction that protection of their seamen from the competition of Lascar labor is essential to the existence of their own marine. Australia and New Zealand are determined to be white countries, or as nearly so as possible; for that reason they restrict the immigration of the yellow races; and they resent the competition with their own ships of vessels, whether British or foreign, manned by the poorly paid Hindu. They are careful, too, as to the nature of the accommodation, food, and sanitary arrangements furnished on their own vessels, and deem it proper that other ships engaging in their trade should comply with their regulations.

Two clauses in a proposed New Zealand statute will indicate sufficiently the line of colonial wishes with reference to wages:

"Seamen employed in ships plying or trading from New Zealand to any port within the Commonwealth of Australia, or from New Zealand to the Cook Islands shall be paid, and may recover the current rate of wages for the time being ruling in New Zealand.

"In the case of ships plying or trading from New Zealand to any port within the Commonwealth of Australia, or from New Zealand to the Cook Islands, which are manned wholly or in part by Asiatics, passenger tickets issued for passages from New Zealand, and bills of lading or shipping documents for cargo shipped in New Zealand, shall be liable in addition to any duty imposed under the Stamp Duties Act, 1908, to a stamp duty equal to twenty-five per centum of the amount of the passage money or the amount charged for freight. Provided that where it is proved to the satisfaction of the collector that the provisions of section two hereof are complied with on any ship, then the provisions of this section shall not apply to that ship" (*a*).

British governments have little real sympathy with the contentions of the colonials, and United Kingdom shipowners, who have always had enormous influence with British governments, deem them very absurd. "Are not Lascars British subjects? Ought not United Kingdom shipowners to be permitted to employ British subjects at as cheap a rate as they can be hired at? And what right have colonies to impose regulations on United Kingdom ships?" I do not believe that there is any way of removing views of that sort other than by transporting the holder of them to some country

(*a*) *Proceedings, Imp. Confer.* 1911, *Cd.* 5745, p. 402.

suffering from the conditions complained of. Tell people (especially the officials) in England, as Sir William Lyne (Australia) told the Shipping Conference in 1911, that:

"One of the sorest points we have in Australia is the fact that so many foreigners are employed in the shipping trade, and also so many Hindus are employed. They are British subjects, but when you pay a man 4½d. as against 6 or 7 shillings, it comes home to the pockets of the men very strongly. That is what they are paying Lascars to-day, 4½d. I speak emphatically about this, because I know how emphatically it is thought of in our country. I hope nothing will be done that will restrict absolutely the power of the government in dealing with a question of this kind" (*a*).

—tell that to the officials of the British Board of Trade, and you make no real impression. You merely put them upon discovery of some method of avoiding that which you want.

The situation is admittedly, for British statesmen, somewhat difficult, and even as Lord Crewe said, "in one sense insoluble" (*b*). It is, however, but a part of the same question as was raised a few years ago by the objection of Canada, Australia, and South Africa to the reception of the Hindus as immigrants. At first the British government told us that these men were subjects of the same King, and could not be excluded from any part of his dominions. That view was soon abandoned—not because British governments disapproved it, but because the colonies were determined to oppose it. At the Colonial Conference of 1897, Mr. Chamberlain expressed a somewhat modified view, with the result that (as the official report, somewhat optimistically tells us)

"Her Majesty's government have every expectation that the natural desire of the colonies to protect themselves against an overwhelming influx of Asiatics can be attained without placing a stigma upon any of Her Majesty's subjects on the sole ground of race or color (*c*).

And now the view held even by the India Office itself is that indicated by Lord Crewe:

"Now I desire to say that I fully recognize—as His Majesty's government fully recognize—two facts: the first is that as the empire is constituted, the idea that it is possible to have an absolutely free interchange between all individuals who are subjects of the Crown—that is to say, that every subject of the King whoever he may be or wherever he may live has a natural right to travel or still more to settle in any part of the empire—is a view which we fully admit, and I fully admit, as representing the India Office, to be one which cannot

(*a*) *Col. Mer. Ship. Conference*, 1907, *Cd.* 3567, p. 32.
(*b*) *Proceedings, Imp. Confer.*, 1911, *Cd.* 5745, p. 395.
(*c*) *Proceedings, Cd.*, 8596 p. 18.

be maintained. As the empire is constituted it is still impossible that we can have a free coming and going of all the subjects of the King throughout all parts of the empire. Or to put the matter in another way, nobody can attempt to dispute the right of the self-governing Dominions to decide for themselves, whom in each case, they will admit as citizens of their respective Dominions" (*a*).

But if colonial right to exclude cheap labor from their shores is conceded, it is impossible to insist upon its introduction upon ships engaged in colonial trade—impossible either as a matter of colonial jurisdiction, or of colonial policy.

The interests of the United Kingdom and the colonies seem to be in irreconcilable conflict. India and its unrest are matters of the greatest concern to imperial statesmen. Their point of view is well expressed in a "Memorandum by the India Office" handed to the conference of 1911, from which the following extracts are made:

"It will not be disputed that each of the Dominions is under the strongest moral obligation to take no isolated action which would involve the empire in war with a foreign power. But it does not appear to have been thoroughly considered that each Dominion owes responsibility to the rest of the Empire for ensuring that its domestic policy shall not unnecessarily create embarrassment in the administration of India. It is difficult for statesmen who have seen Indians represented only by manual laborers and petty traders to realise the importance to the Empire as a whole of a country with some three hundred million inhabitants, possessing ancient civilizations of a very high order, which has furnished and furnishes some of the finest military material in the world to the imperial forces, and which offers the fullest opportunites to financial and commercial enterprise. It is difficult to convey to those who do not know India the intense and natural resentment felt by veterans of the Indian army, who have seen active service and won medals under the British flag, and who have been treated by their British officers with the consideration and courtesy to which their character entitles them, when (as has actually happened) they find themselves described as 'coolies,' and treated with contemptuous severity in parts of the British empire. . . . The efforts of the British government to create and foster a sense of citizenship in India have, within the last few years, undoubtedly been hampered by the feeling of soreness caused by the general attitude of the Dominions towards the peoples of India. . . . The government of India, while appreciating the colonial point of view, cannot, and do not wish to, dissociate themselves from the general feeling of disappointment at the unwillingness of the Dominions to recognize that Indians are entitled to consideration" (*b*).

That is all perfectly true and very well said, but it does not supply an answer to the colonial objection to cheap labor. And probably the only solution is the political independence of the colonies. The United Kingdom ought not to be blamed; she has done all that

(*a*) *Proceedings, Imp. Confer.*, 1911, *Cd.* 5745, p. 395.
(*b*) *Cd.* 5746-1, p. 277.

she can. Her embarrassment arises wholly from the fact that, theoretically and legally, she has a power of control over the colonies which, in reality, she can exercise only in the way of giving counsel and interposition of delay. Conformity of theory to fact would put an end to her trouble.

For a precisely similar reason, The United Kingdom, by her political association with the colonies, suffers embarrassment with regard to foreign countries. For if the colonies insist upon foreign ships complying with their regulations, foreign countries might, under present circumstances, hold the metropolitan responsible and retaliate with regulations inhibitory of the admission, to their ports, of United Kingdom ships. It is true that the United Kingdom has herself taken some risks in this respect by the imposition of certain regulations upon foreign ships, but she has been extremely careful of the reasonableness of her regulations, and has probably had assurance of foreign approval of them prior to their adoption. Upon the whole, they have had a very useful effect in raising the standard of efficiency all over the world(*a*). The proceeding, however, as can easily be seen, is one of the greatest delicacy, and so long as the United Kingdom can be held responsible for colonial regulations, she cannot be blamed for her anxiety as to their character. She believes that those now proposed by the colonies would breed retaliation; and, naturally, she objects to them. The colonies, on the other hand, declare that the regulations are essential to the existence of their own shipping, and they have no anxiety as to retaliation. Once more, the solution is colonial independence. Let the retaliation (if it comes) be applied to those responsible for it.

Jurisdiction of the Dominions: Independence, however, has not as yet been officially suggested as a solution of the difficulties, and the questions which have been and are now being discussed are:

(1) Are the legislative powers of the dominions with reference to merchant shipping already plenary?

(2) If not, ought they to be made so? In other words, ought they to be enabled to carry out their avowed purposes?

As essential preliminary to the consideration of these questions (1) we must understand the precise character of the authority

(*a*) *Proceedings. Col. Confer.*, 1911, *Cd.* 5745, p. 147. Mr. A. Berriedale Keith of the Colonial Office summarizes the British regulations in this way. "The tendency in England is towards increasing severity with regard to foreign vessels. The Merchant Shipping Act, 1906, expressly applies to foreign ships the British load-line provisions, authorises the detention of foreign ships when unsafe owing to defective equipment, etc., provides as to the loading of grain cargoes on foreign ships, applies to all foreign shipping within any port of the United Kingdom certain rules as to life-saving appliances, regulates the loading of timber on foreign vessels which enter British ports, includes foreign steamships under the definition of passenger steamships, and so forth." (*Jour. Soc. Comp. Leg. v.* 9, pp. 202, 3).

which sovereign nations have over ships—their own and foreign; and (2) we must know what parts of that authority the British government admits the dominions already have, and what items in it they dispute.

Every sovereign nation has complete legislative control:

(1) Over its own ships (ships rightly flying the national flag) whether those ships are in home waters or upon the open ocean.

(2) Over its own ships in foreign waters, but subject to local law.

(3) Over seamen and passengers on its own ships, subject to the local law when in foreign waters.

(4) Over all foreign ships, with their seamen and passengers while in national waters. Foreign vessels (save for innocent passage through them) may enter national waters only with the assent of the nation, and must while there, obey all local laws. If such laws are thought to be unfriendly, the question must be raised diplomatically.

Admitted Colonial Jurisdiction. In the earlier days, no attempt was made to define, with any degree of particularity, the extent of colonial jurisdiction. The general idea of the Colonial Office seems to have been to reserve to the Imperial Government,

> "the right to control vessels on the high seas, while leaving to colonial control the management of vessels which are really local (*a*)."

The position now taken by the British government is stated in a memorandum of the Board of Trade (22 November, 1907) as follows:

> "(1) That ships registered in Australia or New Zealand, and ships engaged in the coasting trade of those dominions should be governed by laws made by the Australian and New Zealand parliaments;
>
> (2) That other ships should be governed by the imperial law (*b*)."

The colonies claim: (1) that either their jurisdiction is plenary, or (2) that it must be made so. They do not pretend that the completeness of their own powers negatives the overriding authority of the British parliament. They admit that conflict between the two parliaments must (as in every other department of legislation) be settled by acknowledgment of the supremacy of imperial legislation, but they interpose two points:

1. The conflict must be real—one provision sharply negativing the other. For example, if British legislation requires that ships

(*a*) Keith, *Responsible Government in the Dominions*, p. 195.
(*b*) Cd. 3891, p. 1.

shall carry three engineers, colonial legislation might require four, although it could not reduce the number to two.

2. British legislation does not conflict with colonial unless it is made specially applicable to the colonies. Without such a provision it is applicable to the United Kingdom only.

New Zealand Jurisdiction: New Zealand has not as good a case as have Canada and Australia, and, as we shall see, she appears to accept the view that her jurisdiction is of limited character. Her charter authority extends to the making of laws for her "peace, order and good government", but there are no other words upon which she can found an argument in support of a claim to plenary authority.

Canadian Jurisdiction: The Canadian constitution is better. After a general grant of authority "to make laws for the peace, order and good government of Canada", it continues as follows:

> "And for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated . . ."

and in the enumeration are:

> "The regulation of Trade and Commerce", and
> "Navigation and Shipping."

It might be suggested that the principle words "peace, order and good government *of Canada*" do not include the government of a Canadian ship outside of Canada. But no such suggestion is made. It is admitted, as we have seen, that Canadian law follows Canadian ships everywhere—subject, of course, to foreign laws when they are in foreign water.

The only other limitative suggestion is that Canadian law would not apply to United Kingdom ships when in Canadian waters. But there is nothing in the act to support that idea. The ships of all other countries are amenable to Canadian law, and we constantly enforce it against them. (We have power to exclude them altogether if we wish). There is no distinction in the act between United Kingdom and (for example) American ships. Our legislative authority, therefore, appears to be as ample as that of any other country.

Australian Jurisdiction: The Australian constitution gives to parliament:

"power to make laws for the peace, order and good government of the Commonwealth with respect to:

"(1) Trade and commerce with other countries, and among the states."

"(29) External affairs" (Section 51).

"The power of the parliament to make laws with respect to trade and commerce extends to navigation and shipping" (Section 98).

The statute to which the constitution is appended contains a few governing clauses. One of them is, in part, as follows:

"The laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth(*a*)".

The implication of this last clause would at first sight appear to be that the legislative authority of the Commonwealth would not extend to any ships other than those mentioned. But that would involve the absurdity that the Commonwealth would have no jurisdiction of any kind in respect of its own ships (for they, too, are British ships). And the true interpretation, no doubt, is that the clause was intended to add to the authority which Australia had to regulate her own ships (under the general grant of the power)—to add control of all other British ships falling within the description.

The result, therefore, is:

(1) That the Commonwealth has complete legislative control over her own ships wherever they are (subject to local law in foreign water);

(2) That as there is no limitation of her authority in this respect, she has complete legislative control over foreign ships when in her waters; and

(3) That she has control, also, of all United Kingdom ships—

"whose first port of clearance and whose port of destination are in the Commonwealth."

It will be observed that this classification does not include United Kingdom ships engaged in the Australian coasting-trade. The omission, however, is not important. It is supplied by section 736 of the British Merchant Shipping Act of 1894.

(*a*) See Merchant Service Guild v. Currie, 5 C.L.R. (Aus.) 737.

British Legislation: Consideration of the Merchant Shipping Act of 1894 and 1906 (British) may necessitate amendment of the results thus arrived at. But probably all that can be said with any certainty is that the difficulties of decision are more than usually obvious. The contention of the dominions is that the statutes (with the exception of certain specified clauses) do not apply to them; that their powers are to be found in their own constitutions; and that any act of general application must not be construed as intended to override the special constitutions of the dominions.

The arguments *pro* and *con* are many, and of much too special and technical a character for treatment in a Kingdom Paper. They have not as yet been fully stated, but the papers of Mr. R. E. Cunliffe, Solicitor to the British Board of Trade (*a*), Mr. R. R. Garran of the Australian Attorney-General's Department (*b*), and Mr. A. Berriedale Keith (*c*) contain pertinent suggestions. All that can be usefully done in the present Papers is to set out the two clauses of the Merchant Shipping Act of 1894, which are said (by British officials) to indicate the limit of dominion jurisdiction.

"Clause 735, Section (1). The legislature of any British possession may by any act or ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this act (other than those of the third part thereof which relate to emigrant ships), *relating to ships registered in that possession*; but any such act or ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the act or ordinance for the purpose."

"Clause 736. The legislature of a British possession may, by any act or ordinance, *regulate the coasting trade* of that British possession, subject in every case to the following conditions:—

(1) The act or ordinance shall contain a suspending clause providing that the act or ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed;

(2) The act or ordinance shall treat all British ships (including the ships of any other British possession) in exactly the same manner as ships of the British possession in which it is made;

(3) Where by treaty made before the passing of the Merchant Shipping (Colonial) Act, 1869 (that is to say, before the thirteenth day of May, eighteen hundred and sixty-nine), Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the act or ordinance to the contrary, notwithstanding."

(*a*) *Cd.* 2483, p. 56.
(*b*) Report of the Royal Commission, 1904, *Cd.* 3023, p. 59.
(*c*) *Jour. Soc. Comp. Leg.*, Vol. 9, pp. 202-222; Vol. 10, pp. 40-92.

It must be observed that:

(1) Section 735 implies that the act as a whole does apply to ships registered in the dominions.

(2) The Dominions may withdraw their own ships from the operation of the act, with the exception of Part III.

(3) Inferentially and necessarily, the dominions may legislate for those ships wherever they may be.

(4) The dominions may (subject to certain conditions) regulate their own coasting trade.

(5) The dominions are not given control over British ships other than coasters.

(6) No reference is made to foreign ships, and it might be argued that inasmuch as other clauses of the act are specifically made applicable to such ships (for example sections 418, 420, 431, 446, 451, 452, 455, 462, 688; and in the statute of 1906 sections 1, 2, 3, 4, 10, 13, 76, 77) the dominions were not to have authority to legislate with reference to them. But the argument has no validity. The dominions could certainly exclude foreign ships altogether, and *a fortiori* they could give them qualified admission. We shall see that upon this point there is no difference of opinion.

The only qualification (if any), then, of the plenary authority of the Dominions occurs with reference to British ships registered outside the dominion when engaged in trade other than coasting. Such ships, it is said, may call at one or more ports of a dominion without becoming amenable to dominion law; but, on the other hand, it is admitted that if they take a passenger or a pound of freight from one of the ports to another they must conform to local regulations.

History of the Question.

New Zealand Act, 1896: The conflict between the British and dominion governments is (as has been said) of recent origin (*a*). It commenced with the adoption (1896) by the New Zealand parliament of a bill (*b*), which assumed to make provisions with reference to wages upon ships which carried either passengers or goods from one port of New Zealand to another, even when that coastal trade was but an incident in a very much longer voyage—commencing, for example, in Europe and ending there. The Colonial Office challenged this and other provisions, and Mr. Seddon, the Premier of New Zealand, defended his bill in this way:

(*a*) *Proceedings, Imp. Confer.*, 1911, pp. 193, 405, 418.
(*b*) *Cd.* 2483, pp. 83–6.

"As to vessels from abroad entering into coastal trade and being compelled to pay the New Zealand rates of wages, such a course is deemed to be equitable, for these vessels practically compete with vessels which are engaged in the coastal trade all the year round, and which pay the current rate of wages of the colony. If this were permitted, these vessels might come, say, during the grain and wool season, and by reducing the rates it would practically cause a loss to either the producers or to the owners of the New Zealand coastal vessels, whose charges are fixed. If trade were diverted owing to this cause during the brisk months of the year, the owners would have to raise their rates during the dull season; and whilst there would probably be a slight gain to the pastoralists and grain growers, it would happen that a hardship would result to the community generally. As before stated, sections 10 and 11 of the act are designed to secure fair play to the local shipowners and those *bona fide* carrying on coastal trade; and it cannot be denied that the colony has power to make laws which are local in their application and which regulate solely existing trade" (*a*).

The reply of the Colonial Secretary did not question the constitutional authority of New Zealand. After stating that the effect of the bill might be to give to seamen on British ships higher rates of wages than those contracted for, the memorandum proceeded to say that:

"accepting Mr. Seddon's contention that it is within the power of the New Zealand legislature to alter while operating in New Zealand a contract made here, that contention at least *gives rise to a question of policy.* Mr. Seddon appears to urge in defence of the section that British ships from abroad would otherwise compete unfairly with New Zealand coasting ships, and that the section treats all British ships alike. It must be admitted that there is considerable force in this argument, but the question should be carefully considered in all its bearings" (*b*).

Eventually the bill received the Royal assent and became law. The question was one of policy, merely—one, therefore, with which the Colonial Office ought not to have interfered.

New Zealand Act, 1903: Afterwards (1903) the passage by the New Zealand parliament of a very comprehensive bill (*c*) consolidating the previous statutes gave rise to further correspondence. The objections to the bill were stated in reports by the solicitors of the shipowners' parliamentary committee (*d*), and the solicitor of the Board of Trade (*e*), but eventually (6 March, 1905) the Colonial Secretary advised the government of New Zealand that the bill would be assented to, adding, however:

(*a*) *Ibid.*, pp. 4, 5.
(*b*) *Ibid.*, p. 7.
(*c*) *Ibid.*, pp. 87–163.
(*d*) *Ibid.*, p. 35.
(*e*) *Ibid.*, pp. 56–63.

"Your ministers are, of course, aware that *any provisions in Bill conflicting with Merchant Shipping Act* 1894 *are void and inoperative under Colonial Laws Validity Act* 1865, and that any provisions purporting to regulate conduct of ships, and persons on ships, not registered in New Zealand when these ships are outside the limits of the colony must be equally inoperative" (*a*).

Some of the objections to the bill were based upon the assertion that New Zealand had exceeded her powers, and others were directed to points of policy. Inasmuch as the Colonial Office had no right to dictate policy, and inasmuch as questions of *ultra vires* ought to be settled by the courts, the bill was properly assented to.

Australian Bill, 1904: Between the passage of this latter New Zealand bill and the Royal assent to it, a somewhat similar bill (*b*) was introduced (1904) into the Senate of the Australian parliament, and was at once referred for examination to a Royal Commission. The reports (1906, both majority and minority) together with a memorandum on the constitutional question by Mr. R. R. Garran are printed in *Cd.* 3023. British objections to the bill were formulated by the solicitors of the Liverpool Shipowners Association (*d*), and the Chairman of the Shipowners' Parliamentary Committee (*c*). Meanwhile, parliamentary proceeding upon the bill was delayed.

The Merchant Shipping Conference, 1907: The Colonial Secretary now determined to make a comprehensive effort to deal with the whole subject. Writing to the Governors of Australia and New Zealand (8 March 1905) he said:

"The difficulties surrounding the question of the conditions which are to govern merchant shipping under the British flag cannot, in their opinion, be properly met by a continuance without modifications of the existing system, under which the several parts of the empire may, and do, legislate with different results in many important matters in which uniformity is desirable. The introduction of the Commonwealth bill, and the recent passage of a comprehensive act in New Zealand have led His Majesty's government to the conclusion that the time has now come when the whole situation should be reconsidered in the light of the experience of the ten years since the Merchant Shipping Act of 1894 was passed.

"Your ministers will see from the documents enclosed in this despatch that the difficulties of the present system fall under two heads; first, the legal and constitutional questions concerning the scope of the powers enjoyed by colonial legislatures under the Merchant Shipping Act 1894; and secondly, the practical inconveniences arising from divergent legislation by the parliaments of the United Kingdom and of the Colonies.

(*a*) *Ibid.*, p. 79.
(*b*) *Ibid.*, pp. 164–212.
(*c*) *Ibid.*, pp. 13-31.
(*d*) *Ibid.*, pp. 31-34.

"I have already said that in the opinion of His Majesty's government the time has come to reconsider the whole situation. It is impossible to discuss and settle by correspondence questions of the magnitude and complexity which such a reconsideration involves; and they, therefore, propose that at as early a date as can be arranged a conference, composed of representatives of the United Kingdom, Australia and New Zealand, should meet here with the object of obtaining as much uniformity as is feasible in shipping legislation, and of removing ambiguities which lead, or are likely to lead, to litigation and confusion (*a*)."

Although called for the purpose of considering "the legal and constitutional questions" as well as points of policy, the representatives of the British government at the conference (March, 1907) suppressed as far as possible all discussion of the legal side of the subject. From one point of view they acted wisely, for if the dominions have jurisdiction over all vessels engaged in their coasting trade (and that is admitted), they, practically, have control of the whole situation. The chairman, Mr. Lloyd George, said:

"I would not raise constitutional issues if I could possibly avoid it. I do not think it is necessary; they are always awkward questions. . . One does not want to raise these questions if we can avoid them. The Imperial Government would rather not; we prefer discussing it on the basis that you are fully within your rights"(*b*).

Proceeding in this friendly way—trying to arrive at uniformity of idea merely—the bearing of the phraseology of the resolutions (adopted by the conference) upon the question of constitutional right was not kept very clearly in mind by the colonial representatives; and the extraordinary result was that although the conference was called to consider policy and legality; and that although it deliberately refrained from discussing legality; yet that one of the resolutions adopted was afterwards quoted (as we shall see) as an agreed disposition of the constitutional question. That resolution (No. 9) was as follows:

"That the vessels to which the conditions imposed by the law of Australia or New Zealand are applicable should be (*a*) vessels registered in the colony, while trading therein, and (*b*) vessels wherever registered, while trading on the coast of the colony; That for the purpose of this resolution, a vessel shall be deemed to trade if she takes on board cargo or passengers at any port of the colony to be carried to and landed or delivered at any port in the colony(*c*).

Canada was not invited to the conference. She has not had experience of the peculiar difficulties which affect Australia and New Zealand, and has (probably for that reason) indicated her concurrence in the view that:

(*a*) *Ibid.*, p. 80.
(*b*) *Cd.*, 3567, p. 4. See also 52, 58, 59, 62, 77, 78, 82, 84, 86, 115, 153, 159.
(*c*) *Cd.* 3567, p. V. And see resols. Nos. 4 and 5.

"Legislation in the British dominions affecting British ships not registered in, nor engaged in, the coastal trade of the dominions, should not impose upon such ships restrictions beyond those imposed by the Imperial Shipping Act" (*a*).

Australian Bill, 1907: How little had been accomplished by evading discussion of the constitutional question was made clear by the almost immediate introduction in the Australian parliament of a new bill. The objections to it by the British Board of Trade were enclosed to the Governor in a despatch (29 November, 1907), in which the Colonial Secretary said:

"In so far as the bill conforms to the resolutions of the conference, His Majesty's government are in full accord with its provisions. At the conference His Majesty's Government recognized, and they desire to put the view on record in the most formal manner possible, that every dominion has the full right and power to regulate, not only vessels registered in that possession, but also all vessels engaged in the coasting trade of that possession (as defined by the 10th resolution of the conference) so long as they are engaged in that trade "(*b*).

"In certain cases, however, the legislation proposed goes beyond those limits by purporting to regulate vessels which do not engage in the coasting trade, and vessels while on the high seas before or after engaging in the coasting trade. In some other cases, resolutions accepted by the representatives of the Commonwealth at the conferences have—probably by inadvertence—not been carried into effect" (*c*).

In the accompanying memorandum of the Board of Trade was the following (already quoted as evincing the present view of the British government):

"The resolutions passed by that conference may be said to establish two main principles:

(1) That ships registered in Australia or New Zealand, and ships engaged in the coasting trade of those dominions should be governed by laws made by the Australian and New Zealand parliaments;

(2) That other ships should be governed by the imperial law" (*d*).

The reply of the Premier of Australia (15 June 1908) was, in part, as follows:

"The two principles stated to have been deduced from the resolutions of the conference appear to indicate a misconception of the real manner and purpose

(*a*) *Cd.* 4355, p. 4.

(*b*) The 10th resolution was as follows: "A vessel engaged in the over-sea trade shall not be deemed to engage in the coasting-trade merely because it carries between two Australian or New Zealand ports,

(*a*) passengers holding through tickets to or from some over-sea place.

(*b*) merchandise consiged on through bill of lading to or from some over-sea place.

(*c*) *Cd.* 3891, p. 7.

(*d*) *Ibid.*, p. 4.

of these resolutions, which has probably been the reason for the opinion that the navigation bill has gone beyond the agreements reached at the conference. The first of these principles may be accepted, but that the second correctly epitomises the results of the conference cannot be conceded. If that principle had been generally admitted, quite a large part of its discussions would have been without object, and the delegates, or some of them at any rate, would have left the conference with most erroneous ideas as to what they had really agreed to.

"The misunderstanding arises from reading resolution No. 9 as if it stood alone, and purported to state the only classes of vessels to which Australian laws are to apply. The form of words used may lead to that conclusion, but the resolution must be considered in the light of the antecedent facts, and be read in conjunction with all the other resolutions of the conference.

"Nowhere in the resolutions or the report of the conference is there to be seen any assertion of this second principle as stated, certainly it was never formulated, and it is submitted that all the circumstances combine to indicate that so sweeping a deduction cannot fairly be considered as having been in the minds of the delegates.

"As was stated during the conference, the laws now in force in some of the Australian states apply, at any rate, as regards certain parts, to vessels of all nationalities which happen to be in the ports of those states, irrespective of the classes of trade they are engaged in, or the countries whence they have come or whither they are proceeding. It was also intimated that it was not the intention of Australia to surrender any of the rights now possessed in regard to such ships, and it is submitted that such was the understanding at the conference" (*a*).

The Colonial Secretary replied (18 September, 1908):

"His Majesty's Government regret that they are unable to agree with your ministers as to the power of legislation in regard to navigation which has been conferred upon the parliament of the Commonwealth of Australia by the imperial act of 1900" (*b*).

And he proceeded to argue in a letter that which could have been much more satisfactorily discussed at the conference, at the same time adding:—

"It is, of course, impossible for any decision as to the actual powers of the Commonwealth parliament to be arrived at except on appeal to a judicial tribunal" (*c*).

But if that be true, there appears to be no answer to Australia's contention that the proper course was to assent to the passage of the bill in order that the point might be put in train for decision by the courts.

(*a*) *Cd.* 4355, pp. 7, 8.
(*b*) *Ibid.*, pp. 19, 20.
(*c*) *Ibid.*, p. 20.

New Zealand Bill, 1907: New Zealand, too, in the latter end of the conference year proposed to pass a statute (*a*) making provision as to the manning of ships engaged in the inter-colonial trade (*b*). Thereupon the Colonial Secretary (2 April 1908) represented to New Zealand that:—

"legislation in the British dominions affecting British ships not registered in, nor engaged in, the coastal trade of the dominions, should not impose upon such ships any restrictions beyond those imposed by the Imperial Merchant Shipping Acts" (*c*).

"The answer of New Zealand (22 June, 1908) was to the point:—

"My ministers are of the opinion that it would not be advisable for the New Zealand government to promise the imperial authorities that it will not initiate legislation imposing restrictions upon British ships not registered in, nor engaged in, the coastal trade beyond those imposed by the Imperial Merchant Shipping Acts, as such a promise might hamper future legislation, especially as regards ships engaged in the inter-colonial trade" (*d*).

In reply the Colonial Secretary appealed to resolution No. 9 of the conference. The correspondence with both colonies proceeded, but we need not follow it.

Imperial Conference, 1911: The Australian and New Zealand bills just referred to having demonstrated the futility of attempts to evade the constitutional question, the whole subject in its various aspects was brought before the Imperial Conference of 1911. Four resolutions were proposed—two of them of very great importance. A short summary of the various debates to which they gave rise will probably be the best way to indicate the views of the members of the Conference, and to form a true estimate of the present situation:—

I. Support of British shipping: Mr. Fisher (Australia) moved:

"That it is advisable in the interests both of the United Kingdom and of the British Dominions beyond the Seas that efforts in favor of British manufactured goods and British shipping should be supported as far as practicable" (*e*).

The resolution was the result of Australia's experience with reference to a bill (1906) which gave a certain preferential rate of duty

(*a*) *Cd.* 3891, p. 3.
(*b*) By inter-colonial trade was intended, principally, the trade with Australia and the smaller islands of the Pacific. These places are regarded as being peculiarly within the sphere of influence of New Zealand and Australia: *Cd.* 3567, pp. 70–73; 81.
(*c*) *Cd.* 4355, p. 3.
(*d*) *Ibid*, p. 18.
(*e*) *Cd.* 5745, p. 134.

to goods manufactured in the United Kingdom when imported (1) in British ships, (2) manned by British seamen, (3) of European descent. Australia had been informed by the Colonial Secretary that the existence of certain treaties made assent to such legislation impossible, and the bill had to be abandoned. The Colonial Office was not very sorry to be able to cite the treaties, for British shipowners disliked the bill itself. It gave a bonus, indeed, to British ships, but only to such British ships as carried crews of European descent, and those British ships were all Australian ships. The bill, therefore, was one which aided Australian and not British shipowners.

Supporting the resolution, Mr. Pearce (Australia) admitted the distinction, and justified it by saying that:

> "*if we exempted British shipping from those conditions we would be subjecting our own Australian shipping to unfair competition from British shipping*; so that we could not take that upon us" (*a*).

Mr. Buxton (President of the British Board of Trade) said that the treaties might be denounced, but his principle objection was stated as follows:

> "We think it is not a question of merely denouncing the treaties, but that if this attempt was made, which is the suggestion, namely, to confine the trade of Great Britain with the Commonwealth to British or to Commonwealth ships, this would be very largely resented by the foreign powers interested, and the result would be that we should be open, as we are open all the world over, to attack and retaliation. . .
>
> "I would point out to the conference that out of the 285,000,000, tons of British shipping all the world over, no less than 164,000,000 tons goes to foreign ports, and a comparatively small portion goes to Australian ports, and therefore for the advantage, and no doubt the considerable advantage, of the trade of the Commonwealth, we do not think it would be worth while to risk the possibility of disadvantage accruing to the very enormous trade which we have with other powers. That is really the substantial reason why, as at present advised, we do not think on the whole it would be expedient to adopt the proposal of the Commonwealth government" (*b*).

In other words even though there had been no other treaties, the British government would not have assented to the proposed bill. But the true reason for the refusal was probably not that put forward, but rather the clause of the bill providing for European crews. Fear of retaliation did not prevent the British government accepting a preferential tariff upon all goods imported into Canada. Germany did, no doubt retaliate, but against Canada only, and if

(*a*) *Ibid.*, p. 135.
(*b*) *Ibid.* p. 137.

foreign countries retaliated because of Australian aid to British shipping, it would, no doubt, be directed against Australia. Foreign countries must assume either one position or the other with reference to the King's dominions—either they must regard all those dominions as forming one political unit, and therefore perfectly free to help one another with reduced tariffs, (or, if they wish, by the abandonment of all tariffs,) in which case there will be no ground for retaliation; or, on the other hand, they must treat the dominions as separate entities, in which case their resentments and retaliations must be confined to those entities of which they have reason to complain.

Sir Wilfrid Laurier put the matter in the way of solution. Seeing that the situation was similar to that with which he had previously to deal—that the first thing to do was to get rid of the treaties, he announced that as the treaties were "an obstacle to Australia" he would, on a subsequent day, move that they ought to be denounced as far as necessary (*a*).

Sir Joseph Ward (New Zealand) agreed with the proposed resolution. Referring to the unfair influence of the foreign subsidy system, he said that sometimes goods going from England to Australia could be sent more cheaply by shipping them to Germany and thence to Australia via England (*b*). He added:—

"In our country we hold a very strong opinion upon this question of our inability to have our own ships protected against extraordinary conditions in the shape of low rates of pay and excessive competition against the legitimate enterprise conducted by vessels manned by British men receiving rates of pay under the arbitration awards in our country, who are supporting their wives and families under reasonable conditions ashore, and who to-day are likely to suffer tremendously as the outcome of the very difficult problem in connection with the importation of British subjects of a different color to our own who are largely manning some of the British ships trading to our countries. I want to take an opportunity of saying here that *the matter is regarded as very serious in our country, that as far as we are concerned everything in our power legitimately which we can do, we intend to do to prevent it.* . . . .

"So that we are up against a very serious proposition in connection with the important matter of supporting British manufacturers and British ships, because it is undeniable that the ships I refer to are British. They may certainly have very good reasons for the way in which they conduct their business, concerning which I am not in any way interfering, but it is the danger to our ships manned by white men of competition against colored seamen and firemen employed at low rates of pay that I speak of" (*c*).

(*a*) *Ibid*, p. 139.
(*b*) *Ibid*, p. 139.
(*c*) *Ibid*, p. 140, 141.

"We are in a very much better position, as far as New Zealand is concerned, to judge what suits our people and to decide what legislation is necessary than the imperial government can be" (*a*)"

The conference being apparently in favor of Sir Wilfrid's proposed resolution, further discussion of Mr. Fisher's was dropped.

II. Navigation Regulations: Mr. Pearce (Australia) moved the following resolution:—

"That it is desirable that the attention of the governments of the United Kingdom and of the Colonies should be called to the present state of the navigation laws in the empire and in other countries with a view to secure uniformity of treatment to British shipping; to prevent unfair competition with British ships by foreign subsidized ships; to secure to British ships equal trading advantages with foreign ships; to secure the employment of British seamen on British ships; and to raise the status and improve the conditions of seamen employed on such ships" (*b*).

This resolution, too, was not well adapted to the point which the mover desired to discuss. It makes no reference to the constitutional question, but it was to that subject that Mr. Pearce devoted his speech.

"As I think every member of the conference knows, whenever a dominion proposes to pass a navigation law it finds itself reminded by the Board of Trade of the existence of the Merchant Shipping Act, and the Board of Trade have pressed, and still press, on the consideration of the dominion governments, the view which I think no dominion government so far has assented to, that the Merchant Shipping Act overrides the dominion legislation even in territorial waters of the dominion itself. The law officers advising the Board of Trade and the law officers of the Commonwealth are in direct conflict as to the power conferred on us by our constitution and the power which the United Kingdom has and which it has expressed in the Merchant Shipping Act. The Board of Trade has in the course of a long correspondence with the Commonwealth government pressed this view with regard to the details of the bill which has been before the Commonwealth parliament for some time. . . .

"What I want to say is this, that I think it is time we had a clear understanding as to how this matter is to be dealt with as between the United Kingdom and the dominions. It seems to me that if we are to get uniformity in reorganising the self-governing powers of the dominions, it is only right that each government should be placed in this position, that it should be allowed to express its will by the passing of an act, and that act should be assented to as a recognition of the power of the dominion to deal with this subject. . . .

"The United Kingdom has taken up the attitude of bringing pressure to bear upon us in the course of the drafting of the bill, and in the passage of that bill through parliament, and we put the view, with all respect, that that is an

(*h*) *Ibid.* p. 150.
(*j*) *Ibid*, p. 144.

undesirable course, and it is one which infringes on the legislative power of the dominion. As our bill will be one of the measures in the forthcoming session, we desire to put the view before this conference, and we anticipate we should have the full support of other dominions in pressing the view upon the government of the United Kingdom that uniformity, or any action to secure uniformity, should be taken subsequent to the dominion passing its legislation, and not prior to and during the course of the passing of that legislation, by a memorandum sent forward by the Board of Trade. . . .

"While this resolution is specific in certain directions, the underlying propositon we have to make to the conference is that, first of all, the right of the dominions to legislate in these matters should not be challenged or questioned, and that we should be given a free hand first of all to place on the statute book our view as to the dealing with this subject, and then that the action to bring about uniformity should be subsequent to the dominion's legislation being assented to by His Majesty's government" (*a*).

Mr. Buxton (Board of Trade) said that:—

"there is no intention of interfering with any constitutional rights which the various dominions may possess. On the other hand there are certain constitutional positions which the home government are bound to take up in reference to those matters of shipping and other questions of that sort" (*b*).

But he refrained altogether from discussion of what the "constitutional rights" were. With reference to the suggestion of "pressure", Mr. Buxton said:

"There is certainly no such intention, and as far as we are concerned our communications are intended to be direct through the governor to the ministers, and not to the public concerned. I think Mr. Pearce should remember that in those matters, especially the ones to which he has referred, there are also great interests concerned which are not simply the interests of the dominion or the Commonwealth, whichever dominion it may be. And as regards the shipping trade here, we are bound to consider and to make representations to the government in reference to a trade which represents about 87 per cent. of the whole compared with the small percentage of any of the particular dominions. I want to emphasize what Mr. Harcourt has said in reference to this matter that the desire in making those communications to the governments concerned is that we should arrive at an amicable decision if possible beforehand, with a view to uniformity and to a workable act, rather than after the act is passed, when it becomes obviously, I think, much more difficult for either side to come to a satisfactory arrangement (*c*).

Mr. Brodeur contended that:—

"The dominions should be given absolute power to deal with the question" (*d*).

(*a*) *Ibid*, p. 144, 145.
(*b*) *Ibid.*, pp. 145–6.
(*c*) *Ibid*, p. 146.
(*d*) *Ibid*, p. 149.

He said that Canadian legislation was "in a sort of chaos." Various local laws had been passed, and in 1894, a British statute was passed which had the effect of overriding the local laws (*a*).

Sir Joseph Ward (New Zealand) said:—

"I hold very strongly the view that we should have wider powers than exist at present in dealing with the important proposal that is submitted by Mr. Fisher and spoken to by Mr. Pearce. We have in our country to deal with the condition of the men who are on board our ships under a system that suits our requirements very well indeed. Unlike the officers and men on board British ships, under our system of settling their rates of wages, the salaries, the ordinary rates of pay and the conditions under which they work, are very different in many respects from what they are in the old country, and we require to have a broadening of the law to enable us to meet the requirements of our own people under the special circumstances in which we find ourselves.

"We require to have a uniformity of law if we can get it, but I certainly think we require to have more power and not so much difficulty in obtaining assent to such measures as we seek now which meet the special requirements of our country. As to the delays and the difficulty of obtaining the assent, I am not stating that those delays that took place were not warranted on account of the position of the Imperial Merchant Shipping Act, and what was required here, but in the legislation we passed dealing with the matter in 1903, eighteen months elapsed before it was assented to, and the amending act which we passed in 1909 (I am not dealing with the act passed last year dealing with Lascars) has received a conditional consent only, subject to legislation regarding a clause in it; in reality it is not law yet, but, subject to a reservation as to the alteration of one clause of that bill, the rest of it is agreed to. But I want to point out the difficulty that arises in a country like ours where we have to wait such a long time, eighteen months in one instance and nearly two years in the second one, to enable the desires and requirements of our own people to be put into statute law, so as to enable our shipping operations to be carried on successfully in New Zealand, and I think there does want to be a broadening of the law to enable more powers to be given to us. We are in a very much better position as far as New Zealand is concerned to judge what suits our own people, and to decide what legislation is necessary than the imperial government can be so far as the oversea dominions are concerned. I am not raising at the present moment the issue of the employment of Lascars in steamers; that comes under a separate heading, and can be dealt with more conveniently later on.

"The matters we think we ought to have absolute power with respect to and as to which there should be no difficulty about obtaining assent to our proposals are on the question of the wages of seamen, the manning of ships trading from the Dominion to the neighboring dominions—that is a very important point, and I daresay Australia concurs in it.

"We want to have complete power over the manning of ships trading between our country and the oversea dominions. It may be far reaching in its effect, but we want it because the conditions of life out in our country are so different to what they are in other portions of the British empire where colored

(*a*) Mr. Buxton challenged this statement and promised to furnish Mr. Brodeur with a satisfactory explanation (p. 152), but afterwards Mr. Bro leur adhered to his view (p.419).

people are employed, that it means practically life or death to great local institutions with very large capital in them, with a large number of people employed and a large number of dependents living on shore. We want to have the power of fixing the regulation of accommodation for seamen and the survey of ships and their life-saving appliances. . . .

"Then we meant to have the fixing of the load line and the regulation of the form and stipulations in bills of lading as to cargoes shipped from the Dominion, and we want to have the regulation with regard to proposals for the employment of Asiatics. We know that raises an important question which comes probably under the heading of emigration, which may be dealt with later on. . . .

"I am not insensible to the fact that there are many difficulties standing in the way of a great empire such as this in governing shipping permeating as it does the wide world, and dealing with the people who are required for the various trades on account of climatic conditions and others to man them. At the same time, while recognizing all that, we want to see our own country protected in the fullest way possible from the inroad of a system which I believe would eventually break down the shipping in our country altogether" (*a*).

The resolution in the following amended form was carried unanimously:—

"That it is desirable that the attention of the governments of the United Kingdom and of the dominions should be drawn to the desirability of taking all practical steps to secure uniformity of treatment to British shipping, to prevent unfair competition with British ships by foreign subsidized ships, to secure to British ships equal trading advantages with foreign ships, to promote the employment of British seamen on British ships, and to raise the status and improve the conditions of seamen employed on such ships" (*b*).

So far, therefore, nothing was accomplished.

III. Treaties: Sir Wilfrid Laurier moved:

"That His Majesty's Government be requested to open negotiations with the several foreign governments having treaties which apply to the Overseas Dominions with a view to securing liberty for any of those dominions which may so desire to withdraw from the operation of the treaty without impairing the treaty in respect of the rest of the empire" (*c*).

Sir Wilfrid quoted the following comments of the *Times* upon his proposal:—

"Obviously, Sir Wilfrid Laurier's new resolution, although in a sense it only carries on the policy of Lord Salisbury's government in 1897, conflicts absolutely with the principle upon which that policy was based. The principle of commercial unity, for the sake of which Lord Salisbury denounced the German and

(*a*) *Ibid*, pp. 149, 150, 151.
(*b*) *Ibid*, pp. 152, 153.
(*c*) *Ibid*, p. 333.

Belgian treaties, and which is manifestly essential to the maintenance of imperial co-operation, would have to be abandoned if the governments of the empire of their own accord decided to adopt separate systems of commercial relations with foreign powers. Denunciation of the existing most-favored-nation treaties even if followed by their resumption on terms, allowing Canada or any other dominion to stand out when it so desired, could only have the gravest results, since it would destroy for good and all the principle of commercial unity within the empire re-established by Lord Salisbury and since accepted by the United States" (*a*).

Sir Wilfrid said that in 1897, Canada desired to give a preference to British goods; that the two old treaties (the German and the Belgian) stood in the way; and that Lord Salisbury had denounced those treaties and set Canada free. Australia, Sir Wilfrid said, was now in the same position with reference to her proposal to give a preference to British ships—old treaties are in the way, and ought to be got rid of. As to the constitutional unity invoked by the *Times*, Sir Wilfrid said:

"The gist of the objection which is made here is, that if this is allowed it would destroy for good and all the principle of commercial unity. I do not know at the present time what principle of commercial unity exists, in view of the different tariffs of the Mother Country and the dominions. The United Kingdom's own tariff is a free-trade tariff. All the other communities represented at this board have not that fiscal policy. They have different fiscal policies, all based upon the principle of raising the revenue by customs duties, but no two tariffs in any of the dominions represented at this board agree; every one is different from the other. All agree in principle, that is to say, that the revenue is to be collected by means of customs duties, but they differ as to the articles on which duty is to be imposed. Now, when we recognize this primary fact that there is not absolute commercial unity, but commercial diversity at this moment in the British empire, in so far as fiscal legislation is concerned, it is not difficult to follow the consequences of the government in the United Kingdom making a treaty which suits its own views and its own requirements, but which will not suit the requirements of Australia, or of South Africa, or of New Zealand, or of Newfoundland, or Canada. Therefore, the principle is no longer at issue; it has been conceded long ago, and it has been recognized that there should be that trade diversity or commercial diversity in the matter, not only of fiscal legislation, but the corollary of fiscal legislation—commercial treaties" (*b*).

Everybody agreed with Sir Wilfrid's resolution. Sir Edward Grey (British Foreign Office) said:—

"The resolution is one which I think from the facts of the case it is clear should be accepted, because, as Sir Wilfrid Laurier has pointed out, the mere fact that for some fifteen years—I take the time from him—the necessities of the case have required that in negotiating commercial treaties between the

(*a*) *Ibid.*, p. 334.
(*b*) *Ibid.*, p. 335.

United Kingdom and the other countries option should be left to the dominions to adhere or to withdraw shows that the modern state of things which now exists in consequence of the developed separate fiscal systems of different parts of the empire is something which is different from the old state of things when older treaties were negotiated. Therefore, it is only natural that, as without exception for some fifteen years, every new treaty of commerce which has been negotiated has been arranged on those lines with an option to the dominions, it follows that a number of the old treaties, which do not contain this option must be felt to be embarrassing. If it had not been that they were felt to be embarrassing by different parts of the empire, this practice of making special arrangement for option in new treaties would never have come into force at all. The mere fact that it has come into force means that the older treaties have been found to be embarrassing, and not to give sufficient elasticity" (*a*).

Sir Edward Grey said that approaches had already been made to some of the foreign governments, and added:—

"If they will agree to do that the course is quite simple; we would then proceed with the modification of the treaty which would leave the old treaty in existence, but in a form which was brought up to date. But supposing they adhere to the line, for instance, taken by the government of Italy that they cannot alter the existing treaty, and it would require the negotiation of a new treaty, then I think that the best course of procedure would be to enter upon the negotiations for a new treaty with the foreign country in question, but without denouncing the existing treaty" (*b*).

The resolution was carried unanimously. That was a splendid bit of work.

IV. Constitutional powers: On the last working day of the conference, Sir Joseph Ward (the imperialist, *par excellence*, of the deputies) moved the following resolution:—

"That the self-governing oversea dominions have now reached a stage of development when they should be entrusted with wider legislative powers in respect to British and foreign shipping" (*c*).

One of the objects aimed at by the resolution being prohibition of cheap Lascar labor, Lord Crewe (Secretary for India) commenced the discussion. He said:—

"As things are, I fully admit that there is no short cut to the solution, so far as I know, in any part of the self-governing dominions, of this question of Indian immigration by the adoption of heroic legislation—that I fully admit. But I do submit with confidence to the conference that the relations between

(*a*) *Ibid.*, pp. 336, 7.
(*b*) *Ibid.*, p. 337.
(*c*) *Ibid*, p. 394.

India and the rest of the empire may be most materially improved by the cultivation of a mutual understanding. So far as the Indian standpoint is concerned, I quite admit that India must admit the main postulates with which I opened these observations, that is to say the undoubted liberty of the self-governing dominions to lay down the rules of their own citizenship, and I can say cheerfully on behalf of the India Office and the government of India, that we will always do our best to explain to the people of India how the position stands in this matter. We will not encourage India in any way to develop what, as circumstances are, can only be called extravagant claims for entrance into the self-governing dominions, and we will do our best to explain to them what the conditions of the empire really are. In turn I think we are entitled and indeed it is our duty to ask the ministers of the self-governing dominions to spread within their own area in each case a realization of how deep and how wide-spread feeling on this subject in India is" (*a*).

"I think it cannot be disputed that until fairly pleasant terms exist between the self-governing dominions and India, within of course, I repeat once more, the necessary limitations which arise from the fact that you are self-governing dominions, it cannot be denied that we are far from being a united empire; however close the connection and however perfect the understanding between the mother country and the self-governing dominions, we are not a united empire unless that understanding spreads to some considerable extent also to that vast part of the empire of which, of course, India is the most prominent division, but which also includes all the Crown Colonies which are inhabited by the various native races. We cannot be a united empire for two reasons: in the first place, you cannot properly speak of a united empire so long as acute and active difficulties exist between the different parts composing that empire, and secondly—this, I am sure, will appeal to ministers here—it is a distinct misfortune and a derogation from the unity of the empire if the mother country continually finds itself implicated in difficulties between various parts of the empire" (*b*).

Sir Joseph Ward said that the difficulty was:—

"that the white races and the colored races, under the extraordinary differences in the rates of pay, under the extraordinary differences in the conditions imposed by the requirements of social life in different portions of the British empire, the white man having in many cases to support a wife and children ashore, cannot under the existing conditions work together . . . The conditions under which they are trading between Australia and New Zealand and on the Australian coast too, are, I repeat, a menace to the whole of the great shipping industry which is owned and controlled and worked in those countries, unless there is some *modus vivendi* arrived at to prevent practically the destruction of the interests of the white crews on board those vessels. For my part, I want to make it perfectly clear—I feel that it is due to the people of my country—that while I am as anxious as any man round this table to preserve all that would make for the consolidation of and unity of the British empire, I feel it absolutely necessary in the interests of the people of my country to ask the British government to do all in their power—and I certainly intend, on behalf of the New Zealand government with my colleagues, to do all in my power—to prevent what really

(*a*) *Ibid*, p. 397.
(*b*) *Ibid*, p. 399.

means the wiping out of the white crews, on the one hand, of the vessels owned in New Zealand unless their rates of pay are lowered to an amount that could not support their wives and children ashore, or, upon the other hand, the necessity for the same rate of pay being paid to the Indians on board ships not only trading to New Zealand but everywhere else in order to prevent undue competition with the white crews, and I think that is defensible both from the Indian standpoint and from the British standpoint" (*a*).

"If a great British steamship company in England finds it necessary for its own purposes, in order to develop and carry on its business, to employ Indians on board its vessels, why should we be put in the position of reducing the conditions and pay of our men because an extremely low rate of pay is paid to our fellow subjects in India"(*b*)?

"I am particularly anxious not to take up too much of the time of the conference, but I feel I have to speak my views upon this question. It is a matter upon which I feel strongly, and upon which the people of my country feel strongly, and what I urge is that the conference ought to do something in the direction of what is contained in the two clauses of the New Zealand bill to which I have referred" (*c*).

Dr. Findlay (Australia) said:—

"If that is kept clearly in view, I want to emphasize another fact, that to-day, in principle, and for years past, the same law has been in existence. We protect our laborers in New Zealand by imposing a tax, in some cases prohibitive, against importations from India into New Zealand. That is how we protect workers ashore. That is not racial; it is purely economic. We say if we admit the product of cheap Indian labor into our market our white workers cannot be paid a living-wage. You will observe, therefore, that it is a purely economic question. Now, in what respect is that different from the case before us? We have white workers on our ships. It is contended that we should allow Indian workers upon other ships to come into our waters and to be paid a rate lower than to-day we force by law our ship owners to pay white workers. Surely, if those ships are coming into the waters of New Zealand, we are entitled to require that they shall submit to the laws of New Zealand" (*d*).

Sir Wilfrid Laurier said:

"My contention has always been and is that under our respective constitutions, at all events the constitution of Canada, our powers to legislate for shipping are plenary, and that any legislation we pass as to shipping is not only valid, but enforceable in law. But the point of difficulty is that whilst, in my judgment, the powers conferred upon the Dominion of Canada to legislate on shipping, and I presume the other dominions also, are plenary and absolute, the British government in granting the power of self-government to the dominions has reserved to itself the power of disallowance, and when legislation is passed of preventing the sanction and putting into force of any such legislation which they think objectionable. While, as I say, the united Kingdom here has asserted to itself the power

(*a*) *Ibid.*, p. 401.
(*b*) *Ibid*, p. 403.
(*c*) *Ibid*, p. 404,
(*d*) *Ibid.*, p. 405.

to disallow any legislation which it is in the power of the self-governing dominions to pass, it has been very chary of exercising that power, except in matters of shipping, whereon it has always maintained the doctrine that it had the power to supervise the legislation passed by the self-governing dominions. That is a question of policy more than a question of law, and I do not think that we require any more power than we have at the present time to pass an act, and, after that act is passed, it is valid absolutely."

DR. FINDLAY: "Are you keeping in mind the section of the Imperial Merchant Shipping Act limiting the power of the oversea dominions?"

SIR WILFRID LAURIER: "I am. This power is granted to us in our constitution, but whether it is a question of law or policy, I sympathize with the object of the resolution whether it is raised in one way or the other. I say I sympathize with that, because we in Canada intend to keep to our doctrine that our powers in shipping are plenary" (*a*).

Mr. Batchelor (Australia) said:—

"There are some statements in the general considerations which appear in the memorandum which one could canvas and challenge; but I may say, speaking for Australia on this matter, that this policy of exclusion of certain races has come to stay absolutely, and has to be recognized" (*b*).

Mr. Pearce (Australia) said:—

"We, in Australia, as you know, have dealt with this question from two sides; one in regard to our shipping law, on which we take up absolutely the same position as New Zealand, and for the same reason, and therefore I am not going over that ground again; the other is that in our mail subsidies, and in our subsidies of shipping for the purposes of trade with the Pacific, we do exclude the colored races, and we do it for a definite purpose. We believe it is in our own interest and in the interest of the empire also, to encourage the employment of Britishers on the shipping that carries that trade. We believe that is a sounder policy from an empire point of view than it would be to allow that trade to drift into the hands of people who would be very little assistance to us in the time of war" (*c*).

Mr. Malan (South Africa) said:—

"With us in South Africa it is not so much a question of labor as a question of self-preservation. We have a very large, an overwhelmingly large, African native population to deal with, and we have peculiar color questions as between the white population and the colored populations in South Africa. Now, what is in the minds of the people in South Africa is that if you introduce, or allow to be introduced, another color problem by having a large Asiatic population scattered over South Africa, you will have then the native of South Africa—the aboriginal native—the Asiatic colored population, and the comparatively small European population. So it becomes a matter of self-preservation for the Europeans, and,

(*a*) *Ibid*, p. 406. And see pp. 418, 9.
(*b*) *Ibid*, p. 408.
(*c*) *Ibid*, p. 409.

therefore, I think that the conference will recognize that as far as South Africa is concerned this is a matter of life and death to us" (*a*).

Lord Crewe said:—

"It is also necessary to say that this is not, as I think Mr. Buxton will point out, a strictly local question. The complaint is not so much that you are entitled to lay down special rules for the men who are working at sea within your waters, as that you desire to apply those rules to men who are taking, so to speak, a through journey, half round the world, and happen to touch in the course of that journey at your ports or at the Australian ports."

SIR JOSEPH WARD: "You recognize that it is the economic question we are dealing with."

EARL OF CREWE: "Entirely."

SIR JOSEPH WARD: "Very well. The Indians would absolutely have the right, as far as their economic questions are concerned, to carry them out as they think proper to suit their race in their own territories. Surely they ought not to object to our doing exactly the same to suit our own race in our territory. That is the point."

EARL OF CREWE: "But I think it must be admitted that such a point of view cannot be expected specially to appeal to the Indians, and very largely for this reason. The desire that he should be paid the standard rate of wages is one which might in a way be supposed to appeal to him; but on the other hand, he has a different and, if you like, a lower standard of comfort. There is nothing morally wrong in a man being a vegetarian and a teetotaller, and his wife and family also, and being able to live very much more cheaply than people who adopt the European standard of comfort. But the standard of comfort it is desired to impose is that of a Briton, or a man of British extraction. That may be a reasonable thing to do, but it is the imposition of that standard and the accompanying rights—I do not see how you can put it in any other way—upon people who, for purposes of their own, are content with a different standard of comfort to which on moral or, indeed, social objection can be made. If a man is content to live on rice and water, and does not require pork, or beef, and rum, he naturally is able to support his family on a very much lower scale. Consequently, you have to convert the entire Indian nation to a theory of economics which they certainly do not hold at present, and to which I think, it would be extremely difficult to convert them" (*b*).

That is, of course, the very natural view of a British satesman, and particularly of a Secretary of State for India. But, on the other hand, the difficulty of convincing the colonies that they must convert British subjects in India to a theory very distasteful to them, before protecting from their cheap labor British subjects in the colonies is overwhelming.

Mr. Buxton (Board of Trade) stated the constitutional situation in this way:—

(*a*) *Ibid*, pp. 409, 10.
(*b*) *Ibid*, p. 411.

"The present principle of merchant shipping legislation is fairly plain and simple. Broadly speaking, the code of law that rules the ship is the code of the country of registration, and that code follows the ship round the world. This general principle is modified in its application to the various parts of the British empire by two other principles. (1) That they have full power to regulate their own coasting trade, even though the ships engaging in it are registered in the United Kingdom or foreign countries. (2) That as regards ships other than their own registered ships, and other than ships engaged in their coasting trade, their legislative powers are restricted to their territorial limits, and are, therefore, inoperative on the high seas. There is an exception in regard to certain powers expressly conferred on Australia by Section 5 of the Australian Constitution Act, which deals with so-called 'round voyages', which begin and terminate within the Commonwealth" (*a*).

Mr. Buxton's principal objection to the resolution was that it was not sufficiently specific; that it did not indicate the extent to which the colonies desired their powers to be widened. And what he wanted particularly was uniformity of navigation conditions "which could only be obtained by an imperial act" (*b*). He said:—

"It is clear that if one dominion or colony is entitled to enforce its own mercantile regulations, each and all must be given the same freedom. Would not chaos then ensue if, and when, each dominion or each colony enforced its particular and varying legislation as regards manning, crew space, load line, etc.

"We must not confine our attention to liners, the class of vessel usually discussed in this connection, but must consider also the case of the ordinary commercial steamers, which represent the largest part of British and foreign commerce. Take the case of a tramp steamship owned and registered in the United Kingdom which is chartered now for a voyage to Australia or New Zealand, now to South Africa, now to Canada, according to the state of the freight market The owner often does not know at what port the ship will touch when the voyage is begun. At present he knows exactly the conditions with which his ship has to comply, and, unless the ship is to engage in the colonial coasting trade, he knows he has no other conditions to comply with than those laid down in the Imperial Act. But suppose each dominion could lay hold of that vessel and subject her in its ports to an entirely fresh code of regulations, alter, say, the requirements of crew space, manning, wages and food scale. Suppose, further (which is quite probable), that the Australian, New Zealand, South African, Canadian, and Newfoundland laws vary on all these different points. How can the ordinary system of shipping be carried on under such conditions; will not the trade be enormously hampered. . . .

"No foreign country attempts to enforce her own rates of wages or manning scales or crew space, &c., on the vessels of another country trading to her ports from abroad; nor does the imperial government interfere with the arrangements on board of a foreign ship while in a port of the United Kingdom except in matters relating to safety, such as cases of overloading, and insufficient life-saving appliances, &c.

(*a*) *Ibid*, p. 412.
(*b*) *Ibid.*, p. 413.

"Those who live in the stress of international competition are convinced that it is not possible effectively to impose on foreign ships regulations affecting their domestic economy. The dominions appear to think that they can impose these conditions on foreign ships as well as British. What will be the effect of their action? If they attempt and fail—a preference will be given to foreign shipping. If they attempt and succeed—retaliation will ensue. The Germans, for instance, would not tamely submit to the imposition of such conditions on their ships. These foreign countries will say—and what would be the answer?—'You have allowed your dominions to impose regulations in order chiefly to prevent undue competition with the local industries. We will do the same. You unduly compete in our ports to the disadvantage of our shipping. In future you must be subject to certain regulations and accommodation which will reduce your competition with us.' What would be the result? The whole force and brunt of the retaliation would fall on United Kingdom shipping. The dominions would suffer not at all or very slightly.

"As regards the resolution itself, I am afraid, for the reasons I have given, His Majesty's government are unable to adopt it as it stands" (*a*).

Sir Joseph Ward in reply said:—

"A resolution of this sort is necessary to enable us to give effect to what the labor conditions of our country require" (*b*).

He did not agree that Canada had already the power "to do what we are seeking to obtain" (*c*). He quoted sections 735, 6 of the Merchant Shipping Act 1894, and said:—

"It will be seen, therefore, that the powers are restricted to the repeal of certain provisions of the Imperial Merchant Shipping Act relating to ships registered in the possession and to the regulation of the coasting trade. Even in these two matters, the colonial acts are not to come into force until assented to by His Majesty. I want to direct attention to what the general law is. This resolution consequently is intended to give us wider powers than are contained in the Imperial Merchant Shipping Act" (*d*).

Mr. Brodeur returned to his point with reference to the chaotic effect of complicating imperial and Canadian legislation. He acknowledged that the imperial statute over-rode the Canadian (*e*).

In reply to Mr. Buxton's request for specification of the nature of the powers sought for, Mr. Pearce (Australia) said:—

"The view that the Commonwealth government take up on this question is that we derive our powers to legislate on this subject from the Constitution Act, and that there is no absolute limit of area, provided that the law is for the peace,

(*a*) *Ibid*, pp. 414, 5.
(*b*) *Ibid*, p. 416.
(*c*) *Ibid*, p. 416.
(*d*) *Ibid*, p. 416.
(*e*) *Ibid*, p. 419.

order and good government of the Commonwealth and is not repugnant to an imperial law applicable to the Commonwealth."

DR. FINDLAY: "The effect of this has not been settled by any legal authority. In New Zealand they have settled it the other way."

MR. PEARCE: "There is a difference of opinion as to the application of those words. We have taken the advice of our crown law officers on it, and I have their memorandum here, which is too lengthy to read, the general effect of which is, that unless there is some prohibition placed on some specific things to be done by us the Merchant Shipping Act does not interfere with us."

SIR JOSEPH WARD: "The courts of New Zealand have settled it the other way" (*a*).

Sir D. de Villiers Graaff (South Africa) said:—

"I may say we have no objection to that resolution" (*b*).

General Botha (South Africa) said:—

"This a legal question, and I shall also abstain from voting, because my own view is that we already have these powers, and if I voted for this resolution it might appear as if we admitted that we do not possess these powers" (*c*).

Mr. Fisher (Australia) said:—

"I take up the same attitude".

"We abstain on the ground that if we voted it might be assumed we had limited powers" (*d*).

As a result, Canada and New Zealand alone voted for the resolution favoring the grant of wider powers. But the only reason for the abstention of Australia and South Africa was that they believed that their authority was already plenary. Sir Edward Morris (Newfoundland) was not present when the vote was taken. He did not intend to vote either way (*e*), but for what reason does not appear.

Comments on the Situation: The last two of the above resolutions, as will be observed, have for their purpose the freedom of the colonies to legislate as they wish with regard to shipping—(1) by releasing them from fettering treaties, and (2) by removing any legislative limitations to which they may now be subject. Nothing could more clearly illustrate the truth of the statement of a previous Paper (*f*) that although the conferences owe

(*a*) *Ibid*, p. 420.
(*b* *Ibid*, p. 422.
(*c*) *Ibid*, p. 423.
(*d*) *Ibid*, p. 423.
(*e*) *Ibid*, p. 422.
(*f*) *Ante.*, p. 97.

their origin to the Imperial Federation League—that although they were organized with a view to closer political union—their effect has been to aid the very rapid advance of the colonies to nationhood:—

"The conferences were instituted for the purpose of forging new political bonds. They have most materially assisted in the disappearance of those which existed" (*a*).

We have been told by some imperialists that the dominions ought to confine their legislative activities to local affairs, and that the regulation of "imperial" affairs ought to be undertaken by some central authority. Very well: Now, with the exception of war, what subject can be mentioned which is more of an "imperial" affair than merchant shipping? And, after the debates of the last conference, will anybody suggest that there is the slightest reason to think that Australia and New Zealand (or Canada, for that matter) would be willing to submit the regulation of ships sailing their waters to any parliament, council or board except their own? It was Sir Joseph Ward himself who, at the conference of which we have been speaking, moved the following resolution:—

"That the empire has now reached a stage of imperial development which renders it expedient that there should be an Imperial Council of State, with representatives from all the self-governing parts of the empire, in theory and in fact advisory to the Imperial government on all questions affecting the interests of His Majesty's dominions oversea" (*b*).

And in his supporting speech, Sir Joseph proposed to transfer to the new body

"those matters common to the whole empire—that is, all those in which every part of it is alike interested" (*c*).

But Sir Joseph is a perfect type of an imperialist. When soaring in the vague and in the indefinite, he easily evokes ringing cheers for "imperial unity", for "imperial" nebulosity, or anything else "imperial"; but ask him which particular item of present New Zealand legislative authority he wishes transferred to London, and he is as much a nationalist as anybody else. It was on the 25th May that Sir Joseph proposed an imperial parliament or a council (His uncertainty was as marked as that) for the regulation of common

(*a*) Ante, p. 101.
(*b*) *Ibid.* p. 104.
(*c*) Proceedings, p. 58.

affairs, and on the 19th June he moved the resolution (quoted above) demanding that control of British and foreign shipping in New Zealand should be confided to New Zealand.

Possibly, Sir Joseph may say that shipping in New Zealand waters is not a matter "common to the whole empire". I agree; but I ask to be told what, upon that line of reasoning, is common. The truth, of course, is that the interests of the various kingdoms are not only almost always different, but very frequently quite conflicting. And the only method of dealing with them is that which time and experience have provided us with, namely separate and independent parliaments. The whole matter may be summed up as follows:

1. The present treaties suit the United Kingdom, but they are irksome to Australia and New Zealand. They must be got rid of, and the colonies set free.

2. Legislation essential to the well-being of the colonies is anti-imperial, and a source of embarrassment to the United Kingdom in its relations with India. The remedy is colonial independence, and the release of the United Kingdom from responsibility for colonial action.

3. Colonial legislation might provoke retaliation by foreign countries, and prejudice United Kingdom shipping in all parts of the world. Colonial independence would remove all anxiety upon that ground.

It has been said that, thus far, Canada has not experienced any embarrassment by reason of the existence of the differences which have brought the United Kingdom into such sharp disagreement with Australia and New Zealand. Our exemption will probably be of short duration. Our House of Commons has declared that as soon as our new transcontinental railway is completed, the preferential rates of our customs tariff are to be limited to goods arriving by British ships at our own ports. When we attempt legislation to that end, we shall be met by the treaties, and by British fear of retaliation. We must be free to do as we wish.

NATURALIZATION.

While the colonies are endeavoring (as we have just seen) to define more clearly, and, if necessary, to extend their powers of self-government with reference to merchant shipping, the British government is proposing that, colonial authority with respect to naturalization should be materially diminished, and that we should be relegated to a distinctly inferior and subordinate place in constitutional arrangements. It is the first attempt of that sort since Mr. Chamberlain's time, and it must be resisted as firmly as were all his schemes.

On one occasion only has Canada's constitutional development suffered even temporary retrogression, and that was met and cured by armed rebellion. We have never yet assented to any declension in our powers of self-government, and I am well persuaded that we are not going to do it now.

Fortunately, we need no heroics on the present occasion. Indeed, the British government would probably deny that their proposed legislation would have the effect that I have ascribed to it. They might even argue that their intention was rather to extend than to diminish our legislative authority. I am clear, nevertheless, that my view is the correct one, and that the proposals are based upon easily dissipated misapprehension.

And I am, if possible, still more certain that if I am wrong in this first point—if Canada has not the authority which I think she has—she must get it. It is altogether impossible, at our present stage of national development, either (1) that we can assent to be regulated (as is proposed) by any statute other than our own, or (2) that we can admit that we are to be permanently unable to naturalize aliens who are flocking to our shores.

What then is the present position? And what are the proposals?

Complete and Incomplete Naturalization: Naturalization may be complete or incomplete. When it is complete it effectuates a change of nationality—a change in national *status* or standing. Prior to the act of naturalization the man was, for example, a French citizen. Immediately afterwards he has ceased to be French, and has become a British subject. Naturalization can be complete only if sanctioned by the laws of two countries: (1) the law of France (in the case suggested) must permit the man to expatriate himself (to discard his former allegiance—otherwise, no matter what he does, France will still claim him), and (2) the

law of the United Kingdom, permitting his assumption of the new nationality, must be complied with.

Of the various kinds of incomplete naturalization, the only one that need be mentioned is that which arises under a law which provides for limited naturalization only—limited as to place or as to time. For example, naturalization in the United Kingdom is, by the express language of the British statute, limited to the United Kingdom. If a Russian were made a British subject in England, he would be a Russian if he came to Canada. There never has been a completely naturalized British subject. The laws of other countries (the United States for example) provide for complete naturalization. A British subject naturalized in the United States is an American even if he should return to his former home.

Present Position: By our constitution, Canada has legislative control over the subject of naturalization. As Sir Wilfrid Laurier declared at the Imperial Conference of 1911:

> "The British government, in granting the constitutions of the several dominions, has parted with this power of sovereignty, and delegated it to the dominions" (*a*).

Had we desired to do so, we could have provided by our laws for complete naturalization. We foolishly followed the British precedent, and our naturalization extends to Canada only.

We make a man a British subject *in Canada*. When he leaves us, he resumes his former nationality. If, for example, an American were naturalized in Toronto and travelled to a Saskatchewan farm *via* Chicago, he would be an American while passing through the United States. What he would be when he reached his farm, I do not know.

Remedy for such absurdity is, of course, very simple. The United Kingdom and Canada should each amend its statute, and (following the almost universal example of other countries) should provide for complete naturalization. Instead of this simplest of courses, the proposals which come to us from the British government are of the most curious, cumbersome and unacceptable character.

The Proposals: The proposals are contained in a draft bill, and may be divided into two categories:

I. Naturalization in the United Kingdom is declared to carry with it certain effects in Canada; and

(*a*) Proceedings, p. 252.

II. Canada is given certain power with reference to naturalization.

I. Speaking of the first of these categories, there can be no objection to the proposal that the British Secretary of State should be authorized to confer complete naturalization, for that is in no sense an encroachment upon our powers of self-government. France, the United States, and other governments do the same thing, without offending one another, or us. But when British naturalization is declared (as by the present bill) to have certain effects in Canada, we must most respectfully, but most firmly protest that rights in Canada are regulated by Canada alone. The clause is as follows:

(1) A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this act, be entitled to all political and other rights, powers and privileges , and be subject to all obligations, duties and liabilities to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject.

The main objection to this is its departure from the great principle of self-government for which Canada has always struggled. Many years ago, we reached the stage at which the United Kingdom ceased to enact laws operative in Canada (*a*). We are making our own laws and we make them as we please. Now, it is proposed that we are to assent to a reversal of our practice—that the British parliament is to legislate for us. The suggestion is not only unacceptable, it is offensive.

I object to the clause just quoted, not only because it is legislation for Canada, but because it is bad legislation. It might prove to be very embarrassing to Canada. At present there is no British law declaratory of the rights of a naturalized alien in Canada. We must see to it that there never shall be such a law. We must keep control of our own affairs.

That we might object to the provision has been foreseen, and the following clause is proposed as sufficiently safe-guarding our interests:

"Nothing in this act shall take away or abridge any power vested in or exercisable by the legislature or government of any British possession, or *prevent any such legislature or government from treating differently different classes of British subjects.*"

(*a*) I, of course, except constitutional enactments which stand upon different footing.

But we must not have to depend for our constitutional power upon a saving clause; more especially one which stands in sharp contradiction of the main provision which it is supposed to qualify. One section of the bill declares that a naturalized subject shall "be entitled to all the political and other rights" etc., of "a natural-born subject", and the other section permits different treatment of these different classes. What will the courts make of that? At the present time, we have perfect control over everybody in Canada, and no one questions the unlimited scope of our authority. We cannot permit inroad upon that authority, and be told to save what we can under a skimpy saving-clause. We know perfectly well the wishes of the British government with reference to Hindus in Canada, and we shall (as we ought to) treat those wishes with the highest consideration and respect; but we cannot be asked to compromise the supremacy of our legislative authority, and to depend upon the Privy Council for a favorable interpretation of a saving-clause. Objection to Hindus does not meet with much sympathy in England.

II. *Canada's Authority*: Turning now to the clauses which relate to the power Canada is to have with reference to naturalization, their effect is as follows:

(1) Two kinds of naturalization are provided for—one complete and the other local.

(2) We are to have authority (if we wish) to confer complete naturalization, but only according to the regulations of an act of the British parliament, and in no other way.

(3) Our present authority as to complete naturalization is reduced to acceptance or refusal of the British statute.

(4) Various other subsidiary provisions are made.

I have said that the British government would probably assert that their draft bill extends, rather than diminishes our present legislative authority. That idea, however, proceeds upon a very easily displaced misconception. They appear to think that there is something in our constitution or our nature which, at the present time, prevents us conferring complete naturalization. It is said: (1) that colonial legislation can never have effect beyond the geographical limits of the colony; and (2) that, therefore, colonial naturalization can have effect only within colonial limits. There is a great deal of confusion in both statements. Let us examine them.

Extra-territoriality: In a report of a British inter-departmental committee (1908), it is said that:

"a colonial legislature can only legislate for its own territory, and the operation of any colonial law is necessarily restricted to the boundaries of that colony" (*a*).

In one sense, that statement is undoubtedly correct; but in the same sense it is true of every parliament in the world. No legislature can legislate for territory other than its own. If it be suggested that the imperial parliament can, but colonial parliaments cannot, impose laws upon British subjects when in foreign countries, I reply: (1) by denying the correctness of the statement, and (2) by asserting its irrelevancy to the present subject.

(1) No parliament, British or other, can make its laws effective beyond its own jurisdictional limits—with the exception of the ocean, which belongs to nobody. And as to the sea, the British government admits that a colony can follow with its laws a colonial ship (and its crew) into all parts of the world. No colony ever got specific authority for that purpose. It passed as accessory to the right to enact laws for "the peace, order and good government" of the colony.

(2) Assertion of colonial incompetency is irrelevant, for no one suggests (as we shall see in a moment) that a colonial naturalization law would, by its own force, have any effect in a foreign country.

In another sense, the assertion is not true of any parliament. For although no legislature can make its laws effective beyond the limits of its own legislative jurisdiction, every legislature can, and does, pass laws which, by the comity of nations, are given effect to all over the world. For example, Canadian law regulates the rights of persons contracting in Canada, although the litigation about it takes place abroad. In other words, although Canadian law has, of its own force, no operation outside Canada, yet foreign courts, in all proper cases, recognize that the law gives to certain persons certain rights enforceable according to Canadian law in foreign countries.

Elucidation of the point which I am endeavoring to explain may be helped by reference to the analogy supplied by the subject of marriage. Canada's marriage laws are not, of course, in force in the United States; but if, by a proper proceeding under a Canadian statute, a marriage is solemnized in Canada, the status of the wife as a married woman will be recognized by all United States courts. Canadian corporation law furnishes another analogy. The operation of the colonial law is, in one sense, "necessarily restricted to the

(*a*) Cd. 5746-I, p. 238.

boundaries of the colony" but if a Canadian company engages in business in the United States, the status conferred upon the company by Canada will be recognized and upheld.

The application of all this to naturalization is obvious. Canada cannot—no country can—by its laws make an effective declaration as to anybody's status outside its legislative limits. But Canada can confer naturalization, and the status thus given will be *recognized* elsewhere. For recognition by the United States, indeed, we do not depend upon comity alone, for, by treaty, the United States has agreed that those of its citizens who have been, or shall become naturalized according to law within the British dominions shall be held by the United States

"to be in all respects British subjects and shall be treated as such by the United States."

Foolishly, we have never taken advantage of this treaty. We have never done more than to declare an American to be a British subject *in Canada*.

But if I am wrong in my view as to the present sufficiency of colonial authority, and if there be the technical weakness suggested, the remedy is not the assumption of jurisdiction by the British parliament to pass legislation applicable to Canada, but the removal of the defect. If we have no authority to confer complete naturalization, and if we are not to be trusted with that authority except under such limitations as those imposed by the draft bill, the proper method of carrying out the idea of the British Government is to bestow upon us such limited authority as it is deemed advisable that we should have; not to legislate for us. My point is that any authority with which we are to be endowed must be an authority to enact a law for ourselves, and not an authority to introduce into our country a law made by a parliament not our own.

An Objection: It has been suggested that the United Kingdom could not be expected to permit colonies to bestow complete naturalization, because of the international responsibility which it creates. The United Kingdom requires five years residence as a pre-requisite of naturalization. New Zealand requires none, and if all the self-governing dominions may confer naturalization indiscriminately, will not the responsibility of the United Kingdom be unfairly extended? There are various answers:

(1) The responsibility is negligible. If British subjects were a select fifty or sixty, we could readily understand the necessity for minute care with reference to addition to their numbers. But any difference between British and Canadian ideas as to fitness for citizenship cannot be thought to supply a reason for excluding those who reach our standard from association in an allegiance which embraces some hundreds of millions of all sorts and classes—millionaires and paupers, philanthropists and anarchists.

(2) At the present time if an alien naturalized in Canada should go to a foreign country, he is supplied with a passport

"ensuring to him the good offices of His Majesty's diplomatic and consular representatives" (*a*).

Technically the man, during his absence from Canada, would not be a British subject, but, nevertheless, he gets his passport. If he had been completely naturalized he would be treated in the same way.

(3) The only case in which British international responsibility would be increased would be in the possible event of a colonially naturalized alien appealing to the British government for armed protection, rather than for mere diplomatic good offices. Danger of that sort is not sufficiently imminent to justify asking our assent to political subordination.

(4) However, if I am wrong in saying that Canadian legislative authority is now complete, and if the suggestions which I have made are insufficient for the removal of objections to Canada receiving unqualified authority to deal with naturalization, there remains, in any case, our objection to the British parliament legislating for us. Let us receive such constitutional authority as we ought to have, and let us never assent to the creation of law in Canada except by ourselves.

Other Objections to the Bill. Among other objections to the proposed bill, it may be observed that while the bill perpetuates local naturalization, it provides not only (as we have seen) for complete naturalization, but for a mixture of the two sorts—an extraordinary new creation. For if Australia and Newfoundland should adopt the bill, and Canada and New Zealand should not, and if Australia conferred naturalization on a Frenchman, the recipient (according to the proposed bill) would be neither completely nor locally naturalized. He would be British in Australia (as before) and in the

(*a*) Br. Interdep. Rep. 1908. Cd. 5746-1, p. 238.

United Kingdom and Newfoundland (under the bill) but in Canada and New Zealand he would still be French. Sir Wilfrid's maxim at the recent imperial conference was, "A British subject anywhere; a British subject everywhere."

Summary: The proposed bill is objectionable, therefore, for the following reasons:

1. Because it contains legislation effective in Canada. It assumes to declare that persons naturalized in the United Kingdom shall have certain political rights and status in Canada.

2. Because our authority to deal as we wish with different peoples and races is at present admitted, and we cannot agree that it should be reduced to that which we may be able to convince the Privy Council is conserved to us by an ambiguous saving clause.

3. Because the bill provides for complete naturalization proceedings in Canada under its own provisions, and not under Canadian statute. Our assent, indeed, is needed; but, if we do not assent, we can never confer complete naturalization. And if we do assent, we come under the operation of a law not made by our own parliament.

4. Because we have already complete legislative authority with regard to naturalization, and the proposed bill reduces that authority to mere local naturalization.

5. Because it is absolutely essential for the good government of our country that we should have complete control over such an important subject as naturalization.

6. And because if our legislative authority is not now ample, it ought to be extended—not by offering to permit us to place ourselves under regulations made by the British parliament, but by enabling us to legislate for ourselves.

In the Future: Thus far I have written with strict regard to the nature of the political relations which now exist between the United Kingdom and the self-governing dominions. I now desire to call attention to the illustration which the whole discussion very forcibly affords of the futility of continuing to speak of those countries as forming parts of an empire. The difficulties that we have encountered arise solely from the fact that, instead of an empire, we have to deal, practically, although not nominally, with independent kingdoms. No one ever imagined that in an empire there could be anything but unity of citizenship—that there could be a variety of local laws providing for "local" citizenship. And it may be worth while to indicate the nature of the effect which would be

produced by a declaration of Canadian independence—by the fact that the United Kingdom and Canada had become separate kingdoms subject to the same king.

In that case Britons would be British subjects, and Canadians would be Canadian subjects. Each in the country of the other would retain his own status, but at the same time would not be an alien. In other words, a Canadian in England would be a Canadian, but would not be (as an American would) an alien.

If we were to be guided solely by Calvin's case, (*a*) we might be inclined to go further and say that the Canadian would rank in England as a natural-born subject there. Calvin was born in Scotland during the unions of the crowns of England and Scotland, but prior to the parliamentary union of the countries (that is while they were separate kingdoms subject to the same king), and the English court held that he was, in England, a natural-born subject, and as such could hold lands there. "Legiance", it was said, "is a quality of the mind and not confined within any one place." Legiance was regarded as a personal relation between the king and the man, and a subject in one part of his realms must, therefore, be equally a subject in every part.

That was quite in accord with feudal conception, but the decision failed to supply answer to the further question which arose in the Stepney case (*b*), namely, if Hanoverians, born during the union of the crowns of the United Kingdom and Hanover, were natural-born subjects in England, what were they after the dissolution of that union? Plainly they could not, after the separation, continue to be British, and if from that it necessarily followed that, during the union, they could not have been, in all respects, natural-born subjects, all that could be said was (as per Lord Coleridge):

> "It has long been settled that while the crowns of two countries are held by the same person, the inhabitants of the two countries are not aliens in the two countries respectively."

After the declaration of Canadian independence, then, Britons and Canadians will be subjects of the same king; each will have a distinct and separate nationality; but neither of them will be aliens in the country of the other. We shall not be fellow-citizens, but we shall be fellow-subjects.

(*a*) Rul. Ca. Vol. 2, p. 575.
(*b*) 1886, 17 Q.B.D. p. 54.

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The British government is proposing that the British parliament shall pass, with reference to copyright, legislation applicable to Canada of a character somewhat similar to that proposed with reference to naturalization. For reasons, however, that will shortly be mentioned, the proposal is one that we need quarrel with only upon the ground of the suggestion which it contains of departure from our practice of self government.

With the exception of the conduct of our foreign relations, the only subjects of government with respect to which our legislative powers have been supposed, in late years, to be of limited character are naturalization, merchant shipping and copyright. I have shown that so far as naturalization is concerned, the supposition is not well founded, and that with reference to shipping we have not experienced any practical embarrassment. Copyright has been recently our only subject of quarrel, and, as in every other contest, our point is at last being conceded.

The trouble commenced with the passing of the imperial statute of 1842 (5 & 6 Vic. c. 45) which as Sir John Thompson afterwards said:

> "Was immediately attended with great hardship and inconvenience in the North American Colonies" (*a*).

and which was assailed with most vigorous protests.

In 1846 Lord Grey acknowledged that British interference was indefensible, and announced that

> "Her Majesty's government proposes to leave to the local legislatures the duty and responsibility of passing such enactment as they may deem proper, for securing both the right of authors and the interests of the public" (*b*).

In his despatch of the 31st of July, 1868, the Duke of Buckingham and Chandos declared to the Governor-General that

> "the anomalous position of the question in North America is not denied" (*c*).

In 1892, in a most elaborate report, the imperial departmental officials said:

> "Admitting, as we must, that the present state of the Canadian law is unsatisfactory" etc. (*d*).

(*a*) Sess. Pap. (Can.) 1892, No. 81, p. 2.
(*b*) Ibid., p. 4.
(*c*) Ibid., p. 8.
(*d*) Sess. Pap. (Can.), 1894 No. 50, p. 14,

Lord Cranworth, in his judgment in Low *v.* Bouverie (L.R. 3H. L. 100), said:

> "That His Majesty's colonial subjects are by the statute deprived of rights they otherwise would have enjoyed, is plain."

Mr. Justice Moss (Smiles *v.* Belford, I Ont. App. 436) puts the matter fairly and tersely when he says that the effect of the law

> "is to enable the British authorities to give an American publisher a Canadian copyright."

The principal trouble with which we had to contend was the attitude assumed by the United States. That country declined to grant copyright to any book unless the type from which it was printed was set within the United States. British copyright on the other hand was given to any book that was first published in the United Kingdom, and by "published" was meant merely "the issue of copies of the work to the public." No application to any official was necessary—no certificate was needed. An American offered his book for sale before issuing it elsewhere, and he had copyright *throughout the whole of His Majesty's dominions.*

Canada declared that that was unfair. We wanted to give American authors a taste of American law. But we were not permitted. It would really never, never do. The United States would not like it. And British authors made our position unnecessarily galling, for instead of arranging with a Canadian publisher for the supply of books for Canada, they sold Canadian territory to their United States publisher who made such terms as they pleased with Canadian houses.

The situation, therefore, was this:—

(1) An American author set his type at home, sent a few copies to London for sale, and thus secured copyright throughout the King's dominions. The Canadian copyright statute requiring him to do certain things and obtain a certificate was declared to be *ultra vires* —to be unconstitutional (*a*).

(2) If a British or Canadian author desired United States copyright he was obliged to set his type there. Afterwards he shipped his plates into Canada, and struck from them such copies as he wanted for the home market. I have myself done so.

(3) The Canadian market for British books was treated by British authors and publishers as an appendage of the American.

To remedy that humiliating state of things the Canadian parliament passed a bill (1889), but the Colonial Office refused to advise

(*a*) Smiles v. Belford, 1 Ont. A. R., 436; Imperial Book Co. v. Black, 35 Can. S. C. 488

the Queen to assent to it, and it remained inoperative. Sir John A. Macdonald was then the leader of our government, and he used, but unsuccessfully, all his influence in order to secure relief. Sir John Thompson (Minister of Justice and afterwards Prime Minister) went to England and presented (1891, 4) two able and exhaustive memoranda. He declared that "the present policy" resulted in

"making Canada a market for American reprints, and closing the Canadian press for the benefit of the American press" (*a*).

He declared that in Canada the belief was growing that "the present state of the law is odious and unjust". He requested that after so many promises and such long delay

"some step in advance should be taken towards removing Canadian grievances, beyond the mere routine of inquiries, reports and suggestions" (*b*).

And he demanded that Canada be permitted to withdraw from the Berne convention and act for herself, for, as he said:

"Canada has been repeatedly assured that her continuance in any treaty arrangements of this kind would be subject to her own desire to withdraw at any time, on giving the prescribed notice" (*c*).

His mission was fruitless. He could get nothing done. Downing Street was unmoved. Sir John's history of its misdoings, his protests and his demands were all properly labelled and filed, and the "regretable incident" was brought to a close.

Our subsequent quiescence is due, I believe, to the fact that British authors have come to terms with Canadian publishers (*d*), and that those men are indifferent as to the place in which the type is set. Indeed, I have some reason for knowing that they prefer printing and binding in the United States to paying higher prices for the work in Canada. The workmen do not seem to have quite understood the situation.

Our release is coming as a necessary incident of an international agreement made at Berlin in 1908, for the revision of the convention made at Berne in 1887, under which certain provisions were made for the reciprocal protection of authors. The new arrangements necessitate the passing of legislation in the various countries, and

(*a*) Sess. Pap. (Can.), 1892, No. 81, p. 15.
(*b*) Sess. Pap. (Can.), 1894, No. 50, p. 32.
(*c*) Ibid., p. 18.
(*d*) And to the fact that arrangement of that sort has been protected by our statute of 1900.

inasmuch as the day is past in which the British parliament undertakes to legislate for the self-governing colonies, the Colonial Office found itself under the necessity of seeking colonial concurrence and co-operation. Those were readily given but upon the terms, only, that Canada was to have complete control over her own territories, and was to be free to do as she wished (*a*).

The bill which the British government proposes to present to the British parliament provides for what it calls "imperial copyright", by which is meant copyright throughout the King's dominions. But the act (when passed) is not to

"extend to a self-governing dominion unless declared by the legislature of that dominion to be in force therein."

Any Dominion may, moreover, repeal

"all or any of the enactments relating to copyright passed by parliament (including this act) so far as they are operative within that Dominion."

We are invited to place ourselves under the provisions of a statute of a parliament not our own. But we need not do so. And in any case our right now or at any time to repeal all British legislation so far as it affects us gives us complete control.

I am afraid that this Paper is not only unusually long, but unusually dry. I made it long so that I might at once get rid of all that I have to say of technical character. The succeeding numbers will, I hope, be of more general interest.

JOHN S. EWART.

OTTAWA, March, 1912.

(*a*) The Proceedings of the Imperial Copyright Conference 1910, printed in Cd. 5272.

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